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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 444

BINGLER VACATION TOURS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment, entered June 9, 1955, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The judgment dismissed appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's

order prohibited appellant from conducting certain motor carrier operations found to be unauthorized by appellant's certificate of public convenience and necessity.

STATEMENT

Appellant's certificate authorizes the transportation of passengers and their baggage "in special operations" over "irregular routes" on "round-trip sightseeing or pleasure tours" from New York City and points in three New Jersey counties to points in New Jersey and fourteen other Eastern states. Among the operations conducted by appellant under this certificate were regular bus services between New York City and three New Jersey points—two race tracks and a beach resort at Asbury Park. Although the operations were listed as "Sightseeing Tours" in appellant's tariffs, they were widely advertised as "Special Direct Buses." In each operation passengers were transported to their destination in the forenoon and were returned to New York City later the same day. The price of the tickets included only the transportation service. No guides were employed and only short rest stops were made.

In 1949, on complaint of competing carriers authorized to operate regular service on the three routes, the Commission undertook an investigation of appellant's operations. After appropriate proceedings, the Commission concluded that the operations in question were not authorized by appellant's certificate. Pointing out that "bare expeditious transportation between two points . . . is

the fundamental characteristic of ordinary regular-route passenger-carrier service," the Commission thought it "abundantly clear . . . that round-trip sightseeing or pleasure tours, in special operations, which involve radial or territorial grants of authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points. . . . " 62 M.C.C. at 745. The need for such an "accessorial" service, the Commission stated, becomes progressively important if regularity and frequency are introduced as additional factors. 62 M.C.C. at 746. Finding that none of the three operations is "anything more than bare expeditious round-trip passenger transportation between specified points," the Commission directed appellant to cease and desist from the three operations and also "from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it."[1]

The district court, in a carefully considered opinion by Circuit Judge Biggs, unanimously sustained the order and dismissed appellant's complaint.

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[1] The Commission agreed that the three challenged operations might fall within the term "special operations" as that term is used in the certificate but did not "believe this conclusion to be especially significant" in view of the other restrictive language in the certificate. 62 M.C.C. at 741. For the same reason, the Commission found it unnecessary to consider the regular-irregular character of the challenged operations. 62 M.C.C. at 746.

ARGUMENT

1. Appellant's principal contention (Jurisdictional Statement, pp. 7-19) is that the Commission has misconstrued its own certificate. More specifically, appellant attacks the distinction drawn by the Commission between (a) certificates authorizing tour operations in a certain territory and (b) certificates authorizing tour operations between fixed termini. Certificates of the latter type, the Commission held, may under certain circumstances authorize "bare expeditious transportation," without more, between the points specified in the certificate. 62 M.C.C. at 745. On the other hand, under the test enunciated by the Commission, certificates authorizing *territorial* tour operations do not permit "bare expeditious transportation" between fixed termini unless "something extra and something substantial [*e.g.*, meals, lodging, admissions, or guide service] be added to the bare transportation involved." 62 M.C.C. at 745-746.[2] In appellant's view, there is no rational basis for any distinction between the two types of certificates.

This argument, however, ignores the Commission's obligation under the Act to grant new operating rights only when it is found that the proposed service "is or will be required by the present

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[2] See, *e.g.*, *Red Star Sightseeing Line, Inc., Common Carrier Application*, 1 M.C.C. 521 (1937); *Blue & Grey Sight Seeing Tours, Inc., Common Carrier Application*, 8 M.C.C. 124 (1938); *Resler* v. *Hunter Clarkson, Inc.*, 41 M.C.C. 665 (1943).

or future public convenience and necessity." 49 U.S.C. 307(a). In discharging this obligation, the Commission must of course take cognizance of the special circumstances of each application and fashion its certificate accordingly.[3] Thus, in connection with special operations, certification for expeditious point-to-point tour service may depend in large measure on the availability and sufficiency of regular-route service between the specified points. Where regular-route service is adequate, the Commission may see fit to limit the applicant's certificate to territorial tour operations or to deny the application altogether.[4] If the distinction between the two types of certificates were eliminated,

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[3] See *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480. Appellant's reliance on this decision is misplaced. In issue was the construction of §§ 203(a)(14) and 206(a) of the Act, not the construction of a certificate issued by the Commission. Construing these statutory provisions, the Court concluded "that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers." 315 U.S. at 484-485. The case has no relevance here except insofar as it emphasizes the Commission's broad discretion in fixing the scope of operating certificates.

[4] In fixing the scope of a territorial certificate, the Commission also has broad discretion. See *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480: "Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant case, it may extend to all points in a part of that area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission."

"* * * a carrier holding [a territorial certificate], without any fixed responsibility to the public, could concentrate at will on practically any points of its choosing within its authorized territory in direct and destructive competition with the ordinary regular-route carrier upon which the public must depend for its day-to-day basic transportation, in violation of the purport of its certificate and contrary to the public interest and the national transportation policy." 62 M.C.C. at 746. No such problem arises where the certificate authorizes service between two fixed termini "because the authority was specifically granted for that purpose." 62 M.C.C. at 745. The distinction relied upon by the Commission, far from being arbitrary and capricious, provides a wholly reasonable basis for Commission action, as the court below found. And if this be so, judicial review of the Commission's construction of its own certificate is at an end.[5]

2. Appellant further challenges (Jurisdictional Statement, pp. 19-25) the Commission's order insofar as it directs appellant to cease and desist "from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it." This portion of the order, appellant contends, is too vague to be enforced because it "would leave [appellant] in an unwarranted state of un-

[5] *E.g., Malone Freight Lines* v. *United States*, 107 F. Supp. 946, 949 (N. D. Ala.), affirmed, 344 U.S. 925.

certainty concerning the permissible scope of its future operations" and would force appellant "to solve the problem under peril of the heavy penalties provided by section 222 of the Interstate Commerce Act [49 U.S.C. 322]."

Appellant makes no charge of vagueness, it should be noted, as to those portions of the order directing appellant to cease and desist from the designated race track and Asbury Park operations. If these portions of the order are sufficiently precise to enable appellant to understand their impact, appellant should have little difficulty in also understanding that similar conduct—*i.e.*, "bare expeditious transportation" between fixed termini—must be avoided.[6] Particularly is this true in the light of the Commission's detailed exposition of the criteria relevant to a determination of appellant's rights under its certificate. See 62 M.C.C. at 744-746. In any event, appellant's fear of penalties under § 222 for unwitting violations of the order is without substance. Section 222, by its very terms, imposes penalties only on one who "knowingly and willfully" violates a Commission order. Should proceedings be instituted against appellant under § 222, proof that appellant reasonably believed its conduct to be lawful under the order would be a complete defense.[7]

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[6] Compare *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 118 (S. D. Iowa), affirmed, 335 U.S. 875.

[7] Cf. *Inland Freight Lines* v. *United States*, 191 F. 2d 313 (C.A. 10).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

NOVEMBER, 1955.

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 444

BINGLER VACATION TOURS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM FILED (1) JOINTLY BY THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION, APPELLEES, AND (2) JOINTLY BY ASBURY PARK-NEW YORK TRANSIT CORP., QUAKER CITY BUS COMPANY, HUDSON TRANSIT LINES, INC., AND NATIONAL BUS TRAFFIC ASSOCIATION, INC., INTERVENOR-APPELLEES

EDWARD G. WEISS,
140 Market Street,
Paterson, New Jersey

WILMER A. HILL,
Transportation Building,
Washington 6, D. C.,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

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No. 444

BINGLER VACATION TOURS, INC., *Appellant,*

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the District of New Jersey

---

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM FILED (1) JOINTLY BY THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION, APPELLEES, AND (2) JOINTLY BY ASBURY PARK-NEW YORK TRANSIT CORP., QUAKER CITY BUS COMPANY, HUDSON TRANSIT LINES, INC., AND NATIONAL BUS TRAFFIC ASSOCIATION, INC., INTERVENOR-APPELLEES

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, appellant files this its brief in opposition to the above-described motions to affirm the judgment of the United States District Court. The United States and the Interstate Commerce Commis-

sion will be referred to hereinafter collectively as the Government.

THE INTERVENOR-APPELLEES HAVE MISSTATED THE FIRST QUESTION PRESENTED BY OUR APPEAL

The Government, at page 4 of its motion to affirm, has correctly stated that the first of appellant's two principal contentions is that the Interstate Commerce Commission, hereinafter called the Commission, and the District Court, erred in drawing a distinction between (a) certificates authorizing tour operations in a certain *territory* and (b) certificates authorizing tour operations between fixed termini. The discussion at pages 7 to 19 inclusive, of appellant's Statement as to Jurisdiction was addressed to that question. The intervenor-appellees would confuse the issue, however, by asserting incorrectly that the first of the questions raised by appellant's Statement as to Jurisdiction is "whether the Commission's report and order are rendered invalid as a matter of law by the fact that the Commission distinguishes cases involving applications for *regular-route* and *fixed termini* certificates on the ground that no operational analogy necessarily follows between such a certificate and the *irregular-route territorial* certificate here in issue (62 M.C.C. 745)." (Italics supplied by intervenor-appellees). What these intervenor-appellees seek to do, manifestly, is to leave with this Court the erroneous impression that appellant takes the position that there is no valid distinction between the special operations in round-trip sightseeing or pleasure tours, as conducted by appellant, and the regular-route terminal-to-terminal operations maintained by the conventional regular-route transporter of passengers. We repeat for emphasis the title appearing at the top of page 7 of appellant's

Statement as to Jurisdiction, namely, that "THE LAW DRAWS NO DISTINCTION BETWEEN AUTHORITY TO CONDUCT ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS IN A TERRITORY AND CORRESPONDING AUTHORITY BETWEEN SPECIFIED POINTS." When consideration is given to that question—and to that question only—the discriminatory and unnatural nature of the Commission's attempted distinction becomes obvious. The fallacy and casuistry of the foregoing assertion and reasoning by intervenor-appellees permeate their entire discussion of the first question presented by appellant in its Statement as to Jurisdiction; the foundation being so infirm, intervenor-appellees' whole structure must fall.

THE MOTIONS TO AFFIRM RESOLVE THEMSELVES INTO AN INSISTENCE THAT THE CIRCUMSTANCES WHICH CONSTITUTE A TOUR IN THE CASE OF APPELLANT DO NOT CONSTITUTE A TOUR IN THE CASE OF A CARRIER CONDUCTING SPECIAL OPERATIONS IN ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS BETWEEN SPECIFIED POINTS

Beginning at page 4 of its motion to affirm, the Government seeks to answer the first question presented by appellant's Statement as to Jurisdiction by urging that "in connection with special operations, certification for expeditious point-to-point tour service may depend in large measure on the availability and sufficiency of regular-route service between the specified points." It is significant that in its two decisions in this proceeding the Commission nowhere advanced this argument concerning the "availability and sufficiency of regular-route service between the specified points," but in any event, the Commission's reasons for limiting a given applicant's certificate to specified territory or points cannot possibly alter the in-

trinsic *nature* of the authority granted by it. Otherwise stated, when the Commission grants authority to a carrier (appellant) to conduct special operations in round-trip sightseeing or pleasure tours in a given *territory* and thereafter grants authority to another carrier to conduct special operations in round-trip sightseeing or pleasure tours between *two points in that very territory,* it should not be heard to urge that the nature of the operation to be conducted between those two points by the latter carrier is something different from the nature of that to be conducted by the territorial operator (appellant). Such an attempted distinction is palpably arbitrary and capricious; reasoning so tenuous and so subtle is no more than a vehicle for unjust discrimination. Certainly it is not the "fair and impartial regulation of all modes of transportation" which forms the keystone of the Interstate Commerce Act, to which all the provisions of that Act are made subject.[1] Having granted this

[1] The national transportation policy [49 U.S.C., preceding sections 1, 301, 901, and 1001] reads as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate

type and measure of authority to appellant, the Commission should not now be permitted to reduce the authority in scope merely because it spreads throughout a territory. To do so is in effect a revocation of a portion of appellant's operating authority in defiance by the Commission of the provisions of section 212(a) of the Interstate Commerce Act [49 U.S.C., section 312][2]

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to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

[2] So far as here pertinent, section 212(a) reads as follows:

Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *.

THE MALONE FREIGHT LINES CASE IS NOT A PRECEDENT FOR WHAT THE GOVERNMENT HERE SEEKS

The Government, in Footnote 5 at sheet 6 of its motion to affirm, cites *Malone Freight Lines* v. *United States,* 107 F. Supp. 946, 949 (N.D. Ala.), affirmed, 344 U.S. 925. But in that decision the District Court had the following to say:

> "The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law. It is beyond our province to consider 'the soundness of the reasoning by which its conclusions were reached.'"

It is appellant's contention here that the action of the Commission was capricious and arbitrary, that it constituted an abuse of discretion, and that it did violence to established principles of law. The decision in question, clearly enough, constitutes no precedent for what the Government here urges. What we have just said, moreover, furnishes a full answer to the contention by intervenor-appellees at sheet 8 of their motion to affirm (citing *Malone Freight Lines* v. *United States, supra,* and *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, affirmed 324 U.S. 824) that "it is fundamental that the interpretation of its own certificate is peculiarly within the province of the Commission."

THE COMMISSION DID VERY DEFINITELY FIND THAT OPERATIONS IDENTICAL WITH THOSE COMPLAINED OF COULD BE CONDUCTED LAWFULLY UNDER FIXED-TERMINI TOUR CERTIFICATES

We must confess that we are completely at a loss to understand how intervenor-appellees can consistently urge, as they do at sheet 7 of their motion to affirm, that "the Commission did *not* hold that operations identical with those complained of could be conducted lawfully under fixed-tour certificates." We respectfully submit that the intervenor-appellees stultify themselves. Having once contended that the Commission was on sound ground in drawing a distinction between (a) special operations in round-trip sightseeing or pleasure tours in a territory and (b) special operations in round-trip sightseeing or pleasure tours between specified points, it seems almost ludicrous that they should immediately thereafter argue that the Commission did *not* draw such a distinction. They are grasping at straws.

THE DECISION IN THE CAROLINA FREIGHT CARRIERS CASE IS DIRECTLY IN POINT

The Government, in Footnote 3 at page 5 of its motion to affirm, urges that appellant's reliance on *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, is misplaced. It urges this because, it says, "in issue [in the *Carolina Freight Carriers Corp. case*] was the construction of sections 203(a)(14) and 206(a) of the Act, not the construction of a certificate issued by the Commission." But the issue in the case cited was the nature and measure of the service which might be authorized by the Commission to be rendered by the applicant there under the certificate to issue to it under the terms of the "grandfather" clause of section 206(a), just as the issue here is the nature

and measure of the service to be rendered by appellan
under the certificate issued to it under the provision
of the "grandfather" clause of section 206(a). I
each instance the Commission was under obligation t
convert the substance of the statutory provisions int
terms of a fully useable certificate, not to be impaire
by obscure construction. Here, as there, it failed t
do so; it should be taken to task here, just as it wa
there.

THE PENALTIES PROVIDED BY SECTION 222(a) OF THE ACT ARE NOT THE ONLY PENALTIES PROVIDED BY THE ACT FOR VIOLATION OF AN ORDER OF THE COMMISSION

It seems certain that the Government, at sheet 7 o
its motion to affirm, has placed far too broad an in
terpretation upon the provisions of section 222(a)
of the Act;[3] but, however that may be, there is th

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[3] It will not be overlooked that section 222(b) of the Act pro
vides as follows:

> If any motor carrier or broker operates in violation of any
> provision of this part (except as to the reasonableness o
> rates, fares, or charges and the discriminatory characte
> thereof), or any rule, regulation, requirement, or order there
> under, or of any term or condition of any certificate or permit
> the Commission or its duly authorized agent may apply t
> the district court of the United States for any district where
> such motor carrier or broker operates, for the enforcement
> of such provision of this part, or of such rule, regulation, re
> quirement, order, term, or condition; and such court shal
> have jurisdiction to enforce obedience thereto by a writ o
> injunction or by other process, mandatory or otherwise, re
> straining such carrier or broker, his or its officers, agents
> employees, and representatives from further violation of such
> provision of this part or of such rule, regulation, require
> ment, order, term, or condition and enjoining upon it or them
> obedience thereto.

The action of the Commission under section 222(b), be it observed
is not dependent upon a knowing or willful violation.

further fact that appellant would be in peril of proceedings designed to effect revocation of its certificate by reason of possible violation of the Commission's order herein. Such proceedings, on information and belief, are just about to be brought against appellant —based upon its operation, since the decision herein by the District Court, of what it sincerely believes to be tours within the meaning of its certificate.

THE VAGUENESS AND INDEFINITENESS OF THE COMMISSION'S ORDER ARE UNDERSCORED BY THE ABILITY OF OTHER CARRIERS TO CONDUCT THE SAME OPERATIONS, UNDER IDENTICALLY WORDED CERTIFICATES, THAT APPELLANT IS FORBIDDEN TO CONDUCT

The intervenor-appellees, at sheets 10 to 13 of their motion to affirm, strain mightily to make it appear that this decision of the Commission serves to enlighten appellant rather than to leave it in ignorance, as we contend, of its rights and obligations. It seems quite sufficient to comment that the vagueness and indefiniteness of which we complain are made prominent by the fact that the point-to-point carriers in special operations are explicitly authorized to do the very things concerning which appellant is left in such harassing uncertainty.

CONCLUSION AND PRAYER

For all the foregoing reasons, and for those set forth in its Statement as to Jurisdiction, appellant prays that the motions to affirm be denied and that this Court

note probable jurisdiction and assign the proceeding for argument.

Respectfully submitted,

EDWARD G. WEISS,
140 Market Street,
Paterson, New Jersey

WILMER A. HILL,
Transportation Building,
Washington 6, D. C.,
Attorneys for Appellant.

Certificate of Service

I hereby certify that I have this day made service of the foregoing brief in opposition to the said motions to affirm by mailing by first-class mail a copy to each of the following attorneys, being all those of record:

Honorable Simon E. Sobeloff,
Solicitor General,
Department of Justice,
Washington 25, D. C.

Honorable Stanley N. Barnes,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

Robert W. Ginnane, Esquire,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

George Rossi, Esquire,
Assistant United States Attorney,
Newark, New Jersey.

John H. D. Wigger, Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington 25, D. C.

Leo H. Pou, Esquire,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

Edward W. Currie, Esquire,
123 Main Street,
Matawan, N. J.

James F. X. O'Brien, Esquire,
17 Academy Street,
Newark, N. J.

S. Harrison Kahn, Esquire,
Investment Building,
Washington, D. C.

Jack R. Turney, Jr., Esquire,
2001 Massachusetts Ave., N. W.,
Washington 6, D. C.

Dated at Washington, D. C., this 23rd day of November, 1955.

WILMER A. HILL